

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

REBECCA J. LEEPER,

Plaintiff,

v.

CITY OF TACOMA, et al.

Defendants.

CASE NO. C20-5467 BHS-DWC

ORDER ADOPTING REPORT  
AND RECOMMENDATION

This matter comes before the Court on the Report and Recommendation (“R&R”) of the Honorable David W. Christel, United States Magistrate Judge, Dkt. 50, and Plaintiff Rebecca Leeper’s objections to the R&R, Dkt. 51.

**I. FACTUAL & PROCEDURAL BACKGROUND**

In April 2020, Leeper sued Defendants City of Tacoma, Tel Thompson (a former Tacoma Police Department officer), and John Does 1–5 for Thompson’s alleged sexual assault of Leeper while she was working as an employee at Fred Meyer and Thompson served as an off-duty officer at the store. Dkt. 1-1. Leeper brings claims against Thompson for violations of her Fourteenth Amendment rights under 42 U.S.C. § 1983, assault and battery, and intentional infliction of emotional distress. *Id.* Against the City

1 and Doe Defendants, she alleges violations of her Fourteenth Amendment rights under  
2 *Monell v. Department of Social Services*, 436 U.S. 658 (1978), negligent and grossly  
3 negligent hiring, training, and supervision, negligent infliction of emotional distress, and  
4 respondeat superior. *Id.*

5       Leeper filed a motion for partial summary judgment, seeking an order that  
6 Defendants' affirmative defenses of (1) no causation and (2) failure to mitigate are  
7 legally deficient. Dkt. 31. The City and Thompson then filed a joint motion for summary  
8 judgment as to all of Leeper's claims against the City and as to all of her claims against  
9 Thompson, save for her claims of assault and battery and intentional infliction of  
10 emotional distress. Dkt. 33.

11       On June 10, 2021, Judge Christel issued the instant R&R, recommending that the  
12 Court grant Defendants' motion for summary judgment and dismiss the City and Doe  
13 Defendants from the case. Dkt. 50. The R&R further recommended that the Court deny  
14 as moot Leeper's motion for partial summary judgment as to causation but grant her  
15 motion as to failure to mitigate. *Id.* On June 18, 2021, Leeper objected to the R&R,  
16 arguing in part that the R&R did not view the facts in the light most favorable to her, the  
17 non-moving party, and that the questions of material fact preclude summary judgment.  
18 Dkt. 51. On July 8, 2021, Defendants responded. Dkt. 53.

## 19                                   **II.     DISCUSSION**

### 20       **A.     Standard**

21       The district judge must determine de novo any part of the magistrate judge's  
22 disposition that has been properly objected to. The district judge may accept, reject, or

1 modify the recommended disposition; receive further evidence; or return the matter to the  
2 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

3 **B. 42 U.S.C. § 1983 Claims**

4 **1. Claim Against Thompson**

5 Leeper first objects to the R&R's conclusion that Thompson was not acting under  
6 color of state law, arguing that the R&R failed to view the evidence in the light most  
7 favorable to her, the non-moving party, and that the R&R erred in the application of law.  
8 Dkt. 51 at 3–6. When Thompson allegedly assaulted Leeper, he was providing security  
9 services at the Fred Meyer where Leeper worked. Dkt. 41 at 2. Tacoma Police  
10 Department (“TPD”) policy allows officers to engage in police-related secondary  
11 employment where officers utilize their police powers to provide services for private  
12 employers. Dkt. 43, Ex. 2, at 119:5–19. In order to state a claim under § 1983, a plaintiff  
13 must show a constitutional violation and that the alleged deprivation of rights “was  
14 committed by a person acting under color of state law.” *West v. Atkins*, 487 U.S. 42, 48  
15 (1988). The R&R concluded that Thompson was not acting under color of law. Dkt. 50 at  
16 4–8.

17 The Ninth Circuit has developed a three-part test for determining whether an off-  
18 duty officer has acted under the color of state law. The officer must have: “(1) acted or  
19 pretended to act in the performance of his official duties; (2) invoked his status as a law  
20 enforcement officer with the purpose and effect of influencing the behavior of others; and  
21 (3) engaged in conduct that ‘related in some meaningful way either to the officer’s  
22 governmental status or to the performance of his duties.’” *Hyun Ju Park v. City & Cnty.*

1 of *Honolulu*, 952 F.3d 1136, 1140 (9th Cir. 2020) (quoting *Anderson v. Warner*, 451 F.3d  
2 1063, 1069 (9th Cir. 2006)).

3 The R&R concluded that Thompson was not acting under color of law because he  
4 “was not exercising or purporting to exercise his official responsibilities, he did not  
5 identify himself as an officer, display his badge, or ‘specifically associate’ his actions  
6 with his law enforcement duties, and he did not use his official status to deprive [Leeper]  
7 of her constitutional rights.” Dkt 50 at 8.

8 The Court agrees with the R&R’s ultimate conclusion that Thompson was not  
9 acting under color of law. Thompson was off duty at Fred Meyer when the assault  
10 occurred. Notably, however, Thompson wore his full uniform and everything he would  
11 typically wear when on duty with TPD while working at Fred Meyer, including carrying  
12 his service pistol and handcuffs. Dkt. 43, Ex. 12, Deposition of Tel Thomson, at 45:21–  
13 46:19. Thompson also did not indicate any differences between his duties specific to Fred  
14 Meyer and his duties as an active TPD officer. *See id.* at 54:12–22. The Court declines to  
15 adopt the R&R’s analysis that Thompson did not identify himself as an officer or display  
16 his badge because Thompson was wearing his full TPD uniform while working off duty.

17 But the fact that Thompson was identifiable as an officer because he was wearing  
18 a uniform and badge does not result in Thompson acting under color of law. *See Watkins*  
19 *v. Oaklawn Jockey Club*, 183 F.2d 440, 443 (8th Cir. 1950) (fully-uniformed, off-duty  
20 officer not acting under color of law). Viewing the evidence in the light most favorable to  
21 Leeper, the Court concludes that there is no question of material fact here. While  
22 Thompson may have acted or pretended to act in the performance of his official duties by

1 wearing his uniform, there is no evidence from which a jury could decide that Thompson  
2 used his official status to influence the behavior of others when the alleged assault  
3 occurred. *Cf. Anderson*, 451 F.3d at 1069. The Court further agrees with the R&R that  
4 Thompson did not specifically associate his actions with his law enforcement duties. In  
5 sum, Leeper has not met her burden to establish that Thompson was acting under color of  
6 law to preclude summary judgment.

7 The Court therefore adopts the R&R as to this issue.

## 8 **2. Monell Liability**

9 Leeper next objects to the R&R's recommendation to grant Defendants' motion as  
10 to her § 1983 *Monell* claim against the City. Dkt. 51 at 6–7. She argues that the R&R  
11 again failed to view the evidence in the light most favorable to her and that there are  
12 genuine issues of material fact precluding summary judgment. *Id.* To maintain a claim  
13 against the City for Thompson's asserted constitutional violations, there must be a "a  
14 direct causal link between a municipal policy or custom and the alleged constitutional  
15 deprivation." *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). The R&R concluded  
16 that Leeper failed to present specific and significant evidence of an official policy or  
17 custom of the City ignoring complaints about Thompson's sexual harassment. Dkt. 50 at  
18 10. The R&R also concluded that Leeper failed to identify any authorized decision  
19 makers who endorsed such a custom or policy. *Id.* at 11.

20 Even if the R&R erred in concluding that Leeper failed to present evidence  
21 sufficient to create a genuine dispute of material fact as to whether there was an official  
22 policy or custom of ignoring complaints about Thompson, the Court agrees that Leeper

1 failed to identify any authorized decision makers. A custom or policy of inaction “must  
2 be the result of a ‘conscious’ or ‘deliberate choice to follow a course of action . . . made  
3 from among various alternatives by the official or officials responsible for establishing  
4 final policy with respect to the subject matter in question.” *Lee v. City of L.A.*, 250 F.3d  
5 668, 681 (9th Cir. 2001) (quoting *City of Canton*, 489 U.S. at 389 and *Oviatt v. Pearce*,  
6 954 F.2d 1470, 1477 (9th Cir. 1992)). Neither Leeper’s objections nor her response to  
7 Defendants’ motion addresses whether the purported policy of inaction was made by  
8 officials responsible for establishing final policies. *See* Dkt. 51 at 6–7; Dkt. 41 at 24–26.  
9 The Court therefore adopts the R&R as to this issue.

### 10 **C. Negligence-Based Claims**

11 Additionally, Leeper argues that the R&R erred in dismissing her negligent  
12 retention and supervision claim against the City because foreseeability is a question for  
13 the trier of fact. Dkt. 51 at 7. However, Leeper raised this argument in opposition to  
14 Defendants’ motion, and foreseeability was considered by the R&R. *Compare id. with*  
15 *Dkt. 41 at 30*. Objections to a R&R are not a vehicle to relitigate the same arguments  
16 carefully considered and rejected by the Magistrate Judge. *See, e.g., Fix v. Hartford Life*  
17 *& Accident Ins. Co.*, CV 16–41–M–DLC–JCL, 2017 WL 2721168, at \*1 (D. Mont. June  
18 23, 2017) (collecting cases). The Court agrees with the R&R that there are no questions  
19 of material facts as to whether the City negligently supervised Thompson. The Court  
20 therefore adopts the R&R as to this issue.

21 Similarly, the Court agrees with the R&R’s conclusion to grant summary  
22 judgment as to Leeper’s negligent infliction of emotional distress claim. Dkt. 50 at 14–

1 15. The R&R concluded that Leeper could not maintain her negligent infliction of  
2 emotional distress claim because it determined that the City did not negligently supervise  
3 Thompson. *Id.* Leeper's objections do not challenge this conclusion and rather focus on  
4 the objective symptomatology she has suffered as a result of Thompson's alleged assault.  
5 Dkt. 51 at 7–8. The Court therefore adopts the R&R as to this issue.

6 Leeper's objections to the R&R's conclusion to deny as moot her motion for  
7 partial summary judgment as to Defendants' no causation affirmative defense fare no  
8 better. *See* Dkt. 51 at 8–9. The R&R recommended denying her motion for partial  
9 summary judgment because all of her claims against the City had been dismissed. Dkt. 50  
10 at 17. As the Court agrees with the R&R's recommendation and analysis as to Leeper's  
11 claims against the City, it also agrees that her motion for partial summary judgment as to  
12 causation should be denied as moot. The Court therefore adopts the R&R as to this issue.

### 13 **III. ORDER**

14 The Court having considered the R&R, Plaintiff's objections, and the remaining  
15 record, does hereby find and order as follows:

- 16 (1) The R&R is **ADOPTED**;
- 17 (2) Defendants' motion for summary judgment, Dkt. 33, is **GRANTED**;
- 18 (3) Leeper's motion for partial summary judgment, Dkt. 31, is **GRANTED in**  
19 **part and DENIED as moot in part**;
- 20 (4) The Clerk shall terminate the City and Doe Defendants as parties in this  
21 action; and  
22

1 (5) The remaining parties shall submit a joint status report regarding trial  
2 availability and trial length within thirty days of the entry of this Order.

3 Dated this 28th day of September, 2021.

4   
5

6 BENJAMIN H. SETTLE  
7 United States District Judge  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22